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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

LAVERNE N. JONES, Plaintiff and Appellant, v. WELLS FARGO BANK, N.A. et al., Defendants and Respondents.	A112102 (Alameda County Super. Ct. No. RG05194382)

Laverne N. Jones, representing herself, seeks to set aside a voluntary dismissal with prejudice of her previous lawsuit against defendants, and to have her claims against defendants adjudicated. She appeals from a judgment dismissing her action in its entirety after the superior court sustained a demurrer to the first amended complaint without leave to amend.[1] She argues she alleged sufficient facts to support a cause of action in equity to set aside the voluntary dismissal with prejudice of her previous lawsuit. We disagree, and accordingly, affirm.

1 We treat the November 9, 2005, notice of appeal from the order sustaining the demurrer as a premature notice of appeal from the November 15, 2006, judgment of dismissal. (Cal. Rules of Court, rule 2(e)(2); see *Galanis v. Mercury Internat. Ins. Underwriters* (1967) 247 Cal.App.2d 690, 692-693, fn. 1.)

FACTUAL AND PROCEDURAL BACKGROUND[2]

I. Previous Litigation

In 1988, Jones and her husband entered into a motor vehicle finance contract with Wells Fargo Bank (hereinafter the Bank). The contract required them to make monthly payments. Jones eventually stopped paying for the car, and it was repossessed. On October 7, 1992, the Bank sued Jones for breach of the installment finance agreement. Jones did not answer or appear in that action, and a default judgment was entered against her on December 23, 1992.[3]

Three years later, on February 22, 1995, Jones sued the Bank, Sidney Berenstein (the Bank's attorney), Anthony Atty. Services (a process service agency), Anthony Piazza (owner of Anthony Atty Services) and Mike Reade (an employee of Anthony Atty. Services). Together with allegations of unfair business practices associated with her car loan, Jones contended she had never been served with the complaint in the Bank's 1992 action. Her third amended complaint alleged 18 causes of action against the Bank. Only two of the causes of action were directed against additional defendants; Jones alleged the Bank and Berenstein committed an abuse of process, and she alleged all defendants conspired to engage in a malicious prosecution and abuse of process.

On November 30, 2001, the parties and counsel participated in a four-hour mediation session before Judge Richard L. Patsey (ret.). After submitting supplemental briefing to the mediator, the parties returned for a second four-hour mediation session on January 8, 2002. The session culminated in the preparation and signing of an agreement titled "Stipulation For Settlement - CCP § 664.6." In consideration for a payment from the Bank of $25,000 and the Bank's promise to vacate the default judgment it held against Jones, Jones agreed to

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[2] The history of the litigation between the parties is taken, in part, from a previous unpublished opinion. (*Jones v. Wells Fargo Bank* (November 22, 2002, A097707) [unpub. opn.] (*Jones I*).)

[3] Jones pursued an unsuccessful motion to set aside the December 23, 1992, default judgment. Her attempt to appeal from this ruling was dismissed because she failed to file an opening brief.

fully and forever discharge and release all claims and causes of action, whether now known or now unknown, which she had against all defendants in the action, and to dismiss her action "with prejudice as to *all* defendants in said action" (emphasis in original). Jones also agreed to sign, acknowledge and deliver to defendants a standard form of a "Release" of all such claims and causes of action and to sign and deliver to defendants a standard form of "Dismissal with Prejudice" of the action. The Bank was to pay the settlement funds by forwarding them to Jones' former counsel, and the payment was to be made as soon as reasonably possible. The agreement was signed on January 8, 2002 by Jones, her former counsel, the attorney who represented the Bank and Berenstein, and two representatives of the Bank, including a corporate Vice-President.

On January 9, 2002, Jones' former counsel prepared a Request of Dismissal under Code of Civil Procedure section 581, seeking dismissal of the entire action as to all parties with prejudice. The next day, counsel for the Bank acknowledged by letter he had received the request for dismissal, which he would file with the court. The Bank's counsel also arranged for the parties' compliance with other specific terms of the settlement: "The 'Stipulation for Settlement' also calls for Ms. Jones to execute a release. Since the agreement also provided for the bank's dismissal of its collection action with prejudice, a release of the bank's collection claims against Ms. Jones also appeared to be in order. [¶] I enclose a draft form of a 'Mutual Release' for your review and comment. Please note that my client is reviewing this draft concurrently and it is subject to its comments and changes as well. If it is satisfactory with you, however, please go ahead and obtain your client's signature so that we can expedite the conclusion of this matter. [¶] The stipulation provides for the bank's payment within 10 days of the execution of the release and dismissal, but I believe that the settlement check has already been ordered, and that payment can be made promptly upon the parties' exchange of signature pages."

On January 14, 2002, the court clerk entered the dismissal prepared by Jones' former counsel. The following day, Jones filed in propria persona an "Ex Parte Application to Set Aside Stipulated Agreement and Dismissal of Action." She claimed she was under extreme duress during the mediation and argued her former attorney's use of prescription medication

that day made him slower and not capable of acting in her best interest. After the superior court set an expedited briefing schedule, Jones filed a motion, in which she argued the agreement was void because it was not signed by all the parties. At oral argument, the court stated it was not persuaded by Jones' arguments of duress and incompetent counsel. Nor did the court consider the absence of defendant Berenstein's signature to be relevant because the agreement did not bind or obligate Berenstein in any way. On January 24, 2002, the court filed an order denying Jones' motion to set aside the settlement agreement and dismissal of the action.

Ten months later, on November 22, 2002, we dismissed Jones' appeal from the January 24, 2002, order, because the order denying her motion to set aside the voluntary dismissal was not appealable. (*Jones I*, *supra*, at pp. 3-6.) We also declined to treat the notice of appeal as a petition for a writ of mandate because there were no extraordinary circumstances compelling writ review. (*Jones I*, *supra*, at p. 6.) Jones' petition for rehearing was denied on December 13, 2002. She filed a petition for a writ of mandate, which we summarily denied on January 30, 2003. (*Jones v. Superior Court* (January 30, 2003, A101489).)

II. Current Litigation

Two years later, in January 2005, Jones filed her current lawsuit against the same defendants and alleging the same causes of action as in the previously dismissed lawsuit. The Bank demurred to the complaint, but before the hearing on the demurrer, Jones filed a first amended complaint, which is the operative pleading now under review.

In her first amended complaint, Jones re-alleged the same eighteen causes of action against defendants as she had set forth in her earlier lawsuit. She also added factual allegations concerning a nineteenth cause of action for "extrinsic mistake" against all defendants. In the factual section of the pleading, Jones alleged:

> "On January 8th, 2002, the Plaintiff entered into voluntary mediation at the request of her former attorney. The mediation session produced an alleged unilateral offer to settle the claims contained in this complaint by stipulation under [Code of Civil Procedure] 664.6. The Plaintiff's former attorney requested the voluntary dismissal of the Plaintiff's previous action on January 9th, 2002, less than 24 hours

> after the mediation session ended. . . . The Plaintiff did not authorize the voluntary dismissal of her action and moved to set aside the dismissal and the offer to settle on January 14th, 2002. The trial court ultimately DENIED the Plaintiff's motion to set aside. The Plaintiff considers the actions of her former attorney to be an extrinsic mistake that canceled her substantive rights to the case prematurely and inequitably. This suit has been filed as a separate suit in equity on grounds of extrinsic mistake. A nineteenth cause of action for extrinsic mistake has been included in this complaint."

Under the heading for the nineteenth cause of action, Jones expanded on her factual allegations:

> "On January 8th, 2002, the Plaintiff participated in a voluntary mediation session at the request of her former attorney in her previous action case number 753085-4. The session produced a unilateral offer to settle allegedly under [Code of Civil Procedure] 664.6. Said offer was signed by the Plaintiff, her former attorney, Wells Fargo's reported agent, and two of Wells Fargo's defense attorneys. No other principal signed this offer.
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> "The following morning on January 9th, 2002, on information and belief the Plaintiff's then attorney requested that the Plaintiff's action be dismissed with prejudice under [Code of Civil Procedure] 581 et seq. John Chu, attorney of record for Wells Fargo Bank filed the request for dismissal immediate[ly] and the case was officially dismissed on January 14, 2002.
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> "The Plaintiff herein alleges that her previous suit was dismissed prematurely and her substantive rights were canceled before she had entered into a binding and enforceable settlement agreement. The Plaintiff further alleges that [Code of Civil Procedure] 581 et seq[.] does not apply to unilateral offers to settle or settlement agreements and the dismissal of her previous [lawsuit] was not procedural.
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> "The Plaintiff revoked her unilateral offer to settle 7 days later on January 14, 2002. The Plaintiff refused to sign the Mutual Release and refused to accept the compensation offered to her by the Defendant's [sic] in exchanged [sic] for her signature on the Mutual Release."

The Bank demurred to the first amended complaint on the grounds that the doctrine of res judicata barred the first eighteen causes of action, and the nineteenth cause of action seeking to set aside the voluntary dismissal was barred by issue preclusion, a related component of res judicata. Jones opposed the demurrer on the ground the denial of the

motion to vacate the voluntary dismissal of her earlier lawsuit did not bar an independent lawsuit in equity seeking to set aside the dismissal on the basis of extrinsic mistake caused by her former attorney's conduct. Jones also argued there was no binding and enforceable settlement agreement barring a new lawsuit.

The court sustained the demurrer without leave to amend. The court initially noted Jones could not challenge the rulings in the prior litigation. Additionally, the court found Jones' allegations did not support relief based on extrinsic fraud, and that even if her allegations constituted extrinsic fraud, the alleged facts did not support granting her equitable relief from the earlier voluntary dismissal. Having sustained the demurrer without leave to amend, the court issued a judgment dismissing the complaint in its entirety.

DISCUSSION

Our review of the trial court's ruling sustaining the demurrer is de novo. "[W]e do not review the validity of the trial court's reasoning but only the propriety of the ruling itself. [Citations.]" (*Wilner v. Sunset Life Ins. Co*. (2000) 78 Cal.App.4th 952, 958.) We independently evaluate the complaint, construing it liberally, giving it a reasonable interpretation, reading it as a whole, and viewing its parts in context. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Treating as true all material facts properly pleaded, we determine de novo whether the factual allegations of the complaint are adequate to state a cause of action under any legal theory, regardless of the title under which the factual basis for relief is stated. (*Id*. at p. 318.) When a demurrer is sustained without leave to amend, " 'we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. The burden of proving such reasonable possibility is squarely on the plaintiff.' " (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126, citations omitted.) Because Jones does not contend she should be allowed a further opportunity to amend the allegations in her complaint against the named defendants, we review whether the demurrer was well taken.

We need not address any arguments regarding whether every issue raised by Jones in the current lawsuit is barred by the doctrine of res judicata or the related doctrine of issue

preclusion. Even if the current action were not barred by those doctrines, Jones has failed to allege facts which would entitle her to any relief in equity.

Jones argues she has alleged sufficient facts to state a cause of action in equity because the written stipulation for settlement was merely an offer to settle she revoked before acceptance by defendants by tender of payment. We disagree. The written stipulation for settlement was a completed agreement settling Jones' previous lawsuit. It contained all the material terms of the parties' agreement, and was signed by Jones and a corporate officer of the Bank, a named defendant in the action. It specifically designated the Bank as the party to pay $25,000, to Jones in consideration for her release of all her claims and dismissal of the action against all defendants in the action, and provided that Jones' action against all defendants would be dismissed with prejudice. Thus, Jones' argument she did not enter into a binding agreement to settle her previous lawsuit fails.

A voluntary dismissal with prejudice can be attacked in equity "only if the alleged fraud or mistake is extrinsic rather than intrinsic." (*Preston v. Wyoming Pac. Oil Co.* (1961) 197 Cal.App.2d 517, 529.) In her complaint, Jones challenges her former counsel's conduct in arranging for the dismissal of the action with prejudice before compliance with other terms of the settlement agreement, thereby preventing her from seeking to rescind the settlement agreement. In opposing the demurrer, Jones added that at the time of the settlement, she had lost the support of her former attorney and she had signed the agreement under threat and extreme duress.

Jones argues her former counsel's conduct constitutes extrinsic mistake sufficient to support a cause of action in equity. We disagree. Assuming the truth of Jones' allegations, her complaints against her former counsel are not a valid ground to attack the voluntary dismissal with prejudice. (*Preston v. Wyoming Pac. Oil Co., supra*, 197 Cal.App.2d at p. 530.) It is well settled, " 'Equity will not grant relief against a judgment at law, [4] where

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[4] The voluntary dismissal with prejudice of Jones' previous lawsuit constituted a retraxit and determination on the merits. (*Torrey Pines Bank v. Superior Court* (1989) 216 Cal.App.3d 813, 819 (*Torrey Pines Bank*).) "A dismissal with prejudice is the modern name for a common law retraxit. Dismissal with prejudice under [Code of Civil Procedure]

such judgment was obtained in consequence of the neglect, inattention, mistake, or incompetency of the attorney, unless caused by the opposite party.' " (*Id*. at p. 530, quoting from *Greenwood v. Greenwood* (1931) 112 Cal.App. 691, 696.)[5] Jones does not contend the alleged actions of her former counsel were caused by defendants or their counsel. Nor does she allege any facts that would warrant rescinding the settlement agreement as against the Bank or any other defendant.[6]

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section 581 'has the same effect as a common law retraxit and bars any future action on the same subject matter.' " (*Torrey Pines Bank, supra*,, 216 Cal.App.3d at p. 820, citations omitted.) Thus, "[a] retraxit arising from a dismissal with prejudice operates as a legal fiction, and it is given the same finality as if the matter were adjudicated and proceeded to a final judgment on the merits." (*Alpha Mechanical Heating & Air Conditioning, Inc. v. Travelers Casualty & Surety Company of America* (2005) 133 Cal.App.4th 1319, 1331.)

[5] "An exception to this general rule exists in " 'those instances where the attorney's neglect is of that extreme degree amounting to positive misconduct, and the person seeking relief is relatively free from negligence . . . . The exception is premised upon the concept the attorney's conduct, in effect, obliterates the existence of the attorney-client relationship, and for this reason, his negligence should not be imputed to the client. [Citations.]' " (*Kendall v. Barker* (1988) 197 Cal.App.3d 619, 626, (italics omitted) quoting from *Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 898.) "Courts applying that exception have emphasized that '[a]n attorney's authority to bind his client does not permit him to impair or destroy the client's cause of action or defense.' [Citations.]" (*Carroll v. Abbott Laboratories, Inc., supra*, 32 Cal.3d at p. 898.) Here, the record shows that despite any apparent disagreement between Jones and her former counsel, Jones nevertheless signed the settlement agreement, terminating her lawsuit and authorizing the dismissal of her action with prejudice as against all defendants. Assuming she had valid reasons to rescind the agreement and vacate the dismissal, Jones has not alleged any facts showing that her former counsel's compliance with the terms of the settlement agreement after she signed the agreement either impaired or destroyed her right to rescind the agreement and vacate the voluntary dismissal. Jones' redress regarding her complaints against her former counsel may be an action for malpractice. (*Carroll v. Abbott Laboratories, Inc., supra*, 32 Cal.3d at p. 898.) The superior court denied Jones' oral motion to amend her complaint to add her former counsel as a named defendant without prejudice to filing a new complaint in good faith. Because Jones presents no argument as to how she is aggrieved by the court's ruling there is no reason to disturb it. We express no opinion on whether Jones will be able to successfully plead a cause of action against her former counsel.

[6] By her current lawsuit, Jones does not seek to enforce the terms of the settlement agreement. Nevertheless, in her reply brief, she argues she should be allowed to revive her previous lawsuit because the parties have not sought to enforce the settlement agreement,

Because Jones' failure to state a cause of action in equity to set aside the voluntary dismissal with prejudice of her previous lawsuit supports sustaining the demurrer without leave to amend, we affirm the judgment dismissing the action. (*Aubry v. Tri-City Hospital District* (1992) 2 Cal.4th 962, 967 [judgment must be affirmed if any ground for demurrer is well taken].)

DISPOSITION

The judgment of dismissal is affirmed.

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Parrilli, Acting P. J.

We concur:

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Pollak, J.

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Siggins, J.

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which has now become a "dead issue." However, despite the entry of the voluntary dismissal with prejudice, Jones could have enforced the terms of the settlement agreement. The settlement agreement specifically provided it could be enforced by any party by a motion under Code of Civil Procedure section 664.6 *or* by any other procedure permitted by law. . . ." (Italics added.) Thus, Jones was not limited to the motion procedure under Code of Civil Procedure section 664.6. If necessary, she could have sought enforcement of the terms of the settlement agreement by a separate suit in equity. (*Levy v. Superior Court* (1995) 10 Cal.4th 578, 586, fn. 5; *Nicholson v. Barab* (1991) 233 Cal.App.3d 1671, 1681.) Jones' decision not to enforce the terms of the settlement agreement does not permit revival of her settled lawsuit.